

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Rules and Regulations Implementing the)	GC Docket No. 02-278
Telephone Consumer Protection Act of 1991)	
)	
Joint Petition For Declaratory Ruling Relating)	
To Commission's Jurisdiction Over Interstate)	
Telemarketing)	

BELLSOUTH COMMENTS

BellSouth Corporation, on behalf of itself and its wholly owned affiliates ("BellSouth"), by its attorneys, files these Comments in response to the public notice seeking comments regarding Joint Petitioners' Petition for Declaratory Ruling.¹ Joint Petitioners' request that the Commission declare that interstate telemarketing is under the exclusive jurisdiction of the Commission and that states have no authority to regulate in that area. BellSouth supports Joint Petitioners and asks that the Commission grant the relief sought in their Petition.

I. Introduction and Summary

The Petition sets forth, in very compelling terms, that Congress intended for the Commission to exercise jurisdiction over interstate telemarketing practices and left no authority to the states on this matter. Instead of following Congress' intent, the Commission crafted a "conflict preemption approach"² that grants "states concurrent jurisdiction over interstate

¹ *Consumer & Governmental Affairs Bureau Seeks Comment on Petition for Declaratory Ruling Relating to Commission's Jurisdiction Over Interstate Telemarketing*, CG Docket No. 02-278, Public Notice, DA 05-1346 (rel. May 13, 2005).

² *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, *Report and Order*, 18 FCC Rcd 14014 (2003). ("Report and Order"). The Commission decided it would consider "any alleged conflicts between state and

telemarketing by implicitly *assuming* that state regulation in that area is permissible *unless* it conflicts with federal law.”³ This conflict approach has created an administrative nightmare for entities that engage in interstate telemarketing. Indeed, the Petition is very thorough in its description of state laws that conflict with the Commission’s rules governing interstate telemarketing and very effectively demonstrates the quagmire that interstate telemarketers must negotiate in order to conduct business. BellSouth operates in several states identified in the Petition with various conflicting laws. And, these laws have affected how BellSouth conducts business. For example, BellSouth had planned to launch a marketing campaign to promote an aggressive DSL offer. After spending numerous hours in research on state laws regarding the type of proposed telemarketing, BellSouth concluded that it would drop the campaign and seek other avenues to promote the DSL offer. BellSouth does not pretend that all consumers welcome telemarketing offers but some consumers do obtain benefits through telephone solicitation that they might not otherwise receive. In this instance, consumers would have been presented with an attractive broadband services offer. While consumers could have found out about the offer through other advertising and marketing campaigns, many may not have been alerted to the offer and missed the opportunity. These consumers lost this opportunity simply because of the extensive state laws, many of which conflicted with Commission’s rules, over interstate telemarketing.

Clearly, this is not an acceptable means by which to regulate this sector of the economy. Without preemption, entities will be subjected to a hodgepodge of ever-changing regulation with no actual recourse but to comply with each of the states rules, many of which are in direct

federal requirements and the need for preemption on a case-by-case basis.” It encouraged parties that believed “a state law [to be] inconsistent with section 227 or our rules [could] seek a declaratory ruling from the Commission.” *Id.* at 14064-65, ¶ 84.

³ Petition at 4 (emphasis in original).

conflict with the Commission's rules, or refuse to do business in that state.⁴ Congress saw the mistake of multiple state regulations and excluded state regulation over interstate telemarketing. The Commission should follow Congress' intent and grant Joint Petitioners' the relief sought in their Petition.

II. The Commission Has Exclusive Jurisdiction Over Interstate Telemarketing

The Petition provides an excellent analysis of the law. Briefly, no one can dispute that the Commission has jurisdiction over interstate telemarketing. Such jurisdiction is clearly granted to the Commission through § 152(a) of the Communications Act of 1934, as amended ("the Act"). The only debatable question is whether the states share some jurisdiction over interstate telemarketing. The genesis of that debate comes from a section of the Telephone Consumer Protection Act ("TCPA"), which is codified § 227(e)(1) of the Act, where Congress limited the Commission's authority to preempt intrastate regulations. As the Petition points out, the Commission mistakenly found this section to be ambiguous as to whether the TCPA also limited the Commission's ability to preempt state laws related to interstate telemarketing.

There is no ambiguity. Indeed, the *Report and Order* notes that the TCPA amended § 152(b) to give the Commission jurisdiction over both interstate and intrastate telemarketing calls. The *Report and Order* states that Congress did this "based upon the concern that states lack jurisdiction over interstate calls."⁵ Because states do not have jurisdiction over interstate telemarketing calls, the Commission's interpretation that § 227(e)(1) limits the Commission's authority to preempt state imposed regulations over interstate telemarketing calls is illogical.

⁴ As noted in the Petition, the Commission invited entities that are the victim of state laws that conflict with the Commission regulations to seek a declaratory ruling from the Commission preempting the state law. Even if an entity seeks this remedy, such relief usually takes time and money. Because the state enforcement proceedings are not typically stayed, the entity must comply with the state law while the Commission considers the entity's request.

⁵ *Report and Order*, 18 FCC Rcd at 14064, ¶ 83.

Indeed, Congress would not limit the Commission's authority to preempt state laws that Congress did not believe states have authority to enact. Therefore, § 227(e)(1) was not intended to limit the Commission's authority to preempt state imposed laws over interstate telemarketing. The Commission should exercise the full authority granted to it by Congress and declare exclusive jurisdiction over interstate telemarketing.

III. In the Event the Commission Does Not Find Exclusive Jurisdiction over Interstate Telemarketing, It Should Preempt the Field

Even if it continued to find § 272(e)(1) to be ambiguous, the Commission can still rectify the unworkable situation that requires entities to comply with multiple sets of often-conflicting rules that exists today.

As the Commission stated in the *Report and Order*, "it was the clear intent of Congress generally to promote a uniform regulatory scheme under which telemarketers would not be subject to multiple, conflicting regulations."⁶ Indeed, this was the basis for implementing the conflict preemption scheme now in place. The Petition demonstrates, however, that this system does not work. States have numerous laws that conflict with the Commission's rules and are continuing to enact new laws that place even more conflicting restrictions on interstate telemarketing. At least 6 entities have filed petitions with the Commission seeking preemption of state laws over interstate telemarketing that obviously conflict with the Commission rules but no action has been taken on any of the petitions' requests.⁷ Each of these entities is no doubt facing state fines and forfeitures, or if the state proceedings have not been stayed the entities

⁶ *Id.*

⁷ The Commission recently put out a Public Notice seeking to refresh the record on these petitions (DA 05-1347). The overarching issue in each of the individual petitions is addressed by Joint Petitioners. BellSouth requests that the Commission consider these Comments in the record for the individual petitions (the individual petitions are in the same docket as Joint Petitioner's).

have actually paid fines. This not only places interstate telemarketers at huge financial risk (from both state fines and litigation costs associated with fighting the state imposed sanctions) but it also creates a very inefficient waste of Commission resources in processing and disposing of the petitions. With the continued promulgation of new state laws affecting interstate telemarketing, the Commission faces a never-ending cycle. That is, if the Commission followed its *Report and Order* and preempted a state law pursuant to a petition request from an entity, the state could simply enact a new law that was just as egregious as the preempted law during the next legislative session or, even quicker, through public service commission (“PSC”) rule. The Commission should act to eliminate this potential revolving door effect.

The Commission has the authority to preempt state laws that impede the success of Congress’ imposed purpose.⁸ As the Commission recognized in *Report and Order*, Congress intended a uniform regulatory scheme and concluded “that inconsistent interstate rules frustrate the federal objective of creating uniform national rules, to avoid burdensome compliance costs for telemarketers and potential consumer confusion.”⁹ Clearly, the state laws are obstructing Congress’ intent on this matter. Accordingly, should the Commission again mis-apply the statute and find that it does not have exclusive jurisdiction over interstate telemarketing, it should use its general preemptive authority to accomplish the goals of Congress and rid entities of the overly-burdensome¹⁰ requirements of multiple state rules over interstate telemarketing.

⁸ See *City of New York v. FCC*, 486 U.S. 57, 63 (1988).

⁹ *Report and Order*, 18 FCC Rcd at 14064, ¶ 83.

¹⁰ Indeed, the Commission noted this problem in the *Report and Order* long before Joint Petitioners filed compelling evidence on this point in its Petition. See *Report and Order*, 18 FCC Rcd at 14064, ¶ 83 (“The record in this proceeding supports the finding that application of inconsistent rules for those that telemarket on a nationwide or multi-state basis creates a substantial compliance burden for those entities.”).

Conclusion

The Commission has ample authority to implement a uniform set of rules governing interstate telemarketing. This was Congress' intent. The current system simply does not work. Entities should not be subject to different rules to sell the same product based merely on what area code is dialed prior to the solicitation. The federal rules adequately protect consumers and are sufficient across all state boundaries. Accordingly, BellSouth supports the Joint Petitioners and contends the Commission should grant the relief they seek in their Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have this 29th day of July 2005 served the following parties to this action with a copy of the foregoing **BELLSOUTH COMMENTS** by electronic filing.

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